TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Proceedings Below	4
C. Facts Material to the Questions Presented	6
SUMMARY OF ARGUMENT	16
ARGUMENT:	
I. Paragraphs B and C of the Maryland Act fully comport with the Commerce Clause and neither discrimate against nor unduly burden interstate commerce	22
II. Paragraph C of the Act does not deprive Continental of its property without Due Process of Law	35
III. Paragraph D of the Maryland Act is not invalid under the Supremacy Clause of the United States Constitution	40
A. The Court of Appeals of Maryland applied the appropriate federal standards in determining that no conflict exists between Paragraph D and Section 2(b) of the Robinson-Patman Act	42

PAGE

B. The Court of Appeals of Maryland was correct in determining that no actual or potential conflict exists between Paragraph D and Section 2(b) of the Robinson-Patman Act and that the objectives of Paragraph D and federal antitrust policy are harmonious 44

C. Compliance with Paragraph D of the Maryland Act exposes appellants to neither primary-line nor secondary-line liability under Section 2(a) of the Robinson-Patman Act 52

D. Paragraph D of the Maryland Act is not inconsistent with the full purposes and objectives of Congress in enacting the Robinson-Patman Act 55

E. The ultimate determination of those circumstances, if any, under which sellers may horizontally engage in price discussions in order to satisfy the "good faith" requirement of Section 2(b) should be made unencumbered by any problems peculiar to exclusive dealing 58

IV. Paragraph D of the Maryland Act is not invalid under the Commerce Clause 64

CONCLUSION 66

TABLE OF CITATIONS

Cases

PAGE

Abbott Labs v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1 (1976) 52

Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960) 52, 53

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 25, 28, 65

Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163 (7th Cir. 1972) 46

Baxley v. Alabama Dairy Commission, 360 F. Supp. 1159 (M.D. Ala. 1973) 65

Beatrice Foods Co., 76 F.T.C. 719 (1969), *aff'd sub nom.,* Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971) 59

Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied,* 408 U.S. 928 (1972) 46, 61

Best & Co. v. Maxwell, 311 U.S. 454 (1940) ..17, 23, 29

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 34

Bolick-Gillman Co. v. Continental Baking Co., 278 F.2d 649 (9th Cir. 1960) 54

Boston Stock Exchange v. State Tax Commission, ___ U.S. ___, 97 S. Ct. 599 (1977) 29

Breard v. City of Alexandria, 341 U.S. 622 (1951) 17, 25, 27, 33

Brimmer v. Rebman, 138 U.S. 78 (1891) 23, 29

Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific Railroad Co., 393 U.S. 129 (1968) 34, 35

Bunty v. Shell Oil Co., [1972] Trade Reg. Rep. (CCH) ¶74, 252 (D. Nev. 1972) 46

PAGE

Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975) 56

Continental T.V., Inc. v. GTE Sylvania, Inc., —— U.S. ——, 97 S. Ct. 2549 (1977) 64

Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) 46

Daniel v. Security Life Insurance Co., 336 U.S. 220 (1949) 18, 35

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 37, 39

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 23, 24, 25, 29

DeCanas v. Bica, 424 U.S. 351 (1976 .....42, 55, 56

Enterprise Industries v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957) 45, 50

Ferguson v. Skrupa, 372 U.S. 726 (1963) 18, 22, 35

Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 29

FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945) 48

FTC v. Sun Oil Co., 371 U.S. 505 (1963) .....*passim*

Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) 46, 52

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 28, 34

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 23

Hampton v. Graff Vending Co., 478 F.2d 527 (5th Cir.), *cert. denied,* 414 U.S. 859 (1973) 53

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 64

Head v. New Mexico Board, 374 U.S. 424 (1963) 32

PAGE

Hennington v. State of Georgia, 163 U.S. 299 (1896) 22

Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) 17, 23, 28

H.J. Heinz Co. v. Beech-Nut Life Savers, Inc., 181 F. Supp. 452 (S.D.N.Y. 1960) 52, 53

Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29 (7th Cir. 1976) 52, 53

H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) 25, 26, 28

Hunt v. Washington State Apple Advertising Commission, —— U.S. ——, 97 S. Ct. 2434 (1977) 24, 34

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 16, 22, 33, 64

Illinois Brick Co. v. Illinois, —— U.S. ——, 97 S. Ct. 2061 (1977) 54, 64

In re Forster Manufacturing Co., 62 F.T.C. 852 (1963), *rev'd and remanded,* 335 F.2d 47 (1st Cir. 1964), *upon remand,* 68 F.T.C. 191 (1965), *aff'd,* 361 F.2d 340 (1st Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967) 53, 58

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 19, 42

Lemke v. Farmers Grain Co. of Embden, 258 U.S. 50 (1922) 28

Louis K. Ligget Co. v. Baldridge, 278 U.S. 105 (1928) 36

Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949) .18, 35, 39

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) 21, 42, 56, 64

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) 16, 17, 21, 22, 25, 28, 34, 65

Miller v. California, 413 U.S. 15 (1973) 33

PAGE

Minnesota v. Barber, 136 U.S. 313 (1890) 23, 29
Moore v. City of East Cleveland, Ohio, ___ U.S. ___, 52 L. Ed. 2d 531 (1977) 36, 38, 39, 40
Nebbia v. New York, 291 U.S. 502 (1934) 18, 25, 35, 39
New York Department of Social Services v. Dublino, 413 U.S. 405 (1973) 56
Nippert v. City of Richmond, 327 U.S. 416 (1946) 17, 23, 29
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 18, 22, 35, 36
Olsen v. Nebraska, 313 U.S. 236 (1941) 18, 35
Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951) 17, 25, 26
Parker v. Brown, 317 U.S. 341 (1943) 16, 17, 22, 25, 28, 32, 34
Perez v. United States, 402 U.S. 146 (1971) 16, 28
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 16, 22, 29, 34
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 52
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 37
Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm., 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974) .. 21, 65
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) 56
Shafer v. Farmers Grain Co. of Embden, 268 U.S. 189 (1925) 28
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 42, 47
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 34, 64, 65

PAGE

Standard Oil Co. v. FTC, 340 U.S. 231 (1951) 20, 46, 62
Sunshine Anthracite Coal Co. v. Atkins, 310 U.S. 381 (1940) 25
Toomer v. Witsell, 334 U.S. 385 (1948) 29, 30
United States v. Container Corp. of America, 393 U.S. 333 (1969) 60, 61, 63
United States v. Rock Royal Co-op., Inc., 307 U.S. 553 (1939) 25
United States v. United States Gypsum Co., 550 ___ U.S. ___, 46 U.S.L.W., 3182 (U.S. Oct. 3, 1977) 58, 59
Viviano Macaroni Co. v. FTC, 411 F.2d 255 (3d Cir. 1969) 59
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 18, 35, 38
Wickard v. Filburn, 317 U.S. 111 (1942) 16, 28, 32
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 18, 22, 35

Constitution

United States Constitution:
Article I, Section 8, Clause 3 ... 2, 6, 7, 22, 26, 32, 34
Article VI, Clause 2 .....*passim*
Amendment XIV 19, 34, 36, 37, 39, 40

Statutes

United States Code:
Sherman Act, 15 U.S.C. § 1 (1975) 20, 40, 57, 58, 59, 63
Robinson-Patman Act, 15 U.S.C. Sections 13-13b, 21a (1970) .....*passim*
Robinson-Patman Act, Section 2(a), 15 U.S.C. Section 13(a) (1970) 42, 43, 52, 55, 62

PAGE

Robinson-Patman Act, Section 2(b), 15 U.S.C. Section 13(b) (1970) .....*passim*

Robinson-Patman Act, Section 2(f), 15 U.S.C. Section 13(f) (1970) 59, 60

Clayton Act, Chapter 323, Section 2, 38 Stat. 730 (1914) 48

Annotated Code of Maryland:

Article 56, Section 157E(b)-(h) (1957, 1972 Repl. Vol. 1976 Cum. Supp.) (1974 Laws of Maryland, Chapter 854 as amended by 1975 Laws of Maryland, Chapter 608) .....*passim*

Miscellaneous

Brief for Federal Trade Commission, FTC v. Sun Oil Co., 371 U.S. 505 (1963) 45, 47, 51

Department of Justice, Report on the Robinson-Patman Act (1977) 51

Federal Trade Commision, Report on Anticompetitive Practices in the Marketing of Gasoline, 3 CCH Trade Reg. Rep. ¶ 10,373 (1967) 50

H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 40

H.R. Rep. No. 1423, 84th Cong., 1st Sess. (1955) 25, 50

H.R. Rep. No. 1762, 94th Cong., 2d Sess. (1976) 18, 25, 38

Note, Gasoline Marketing and the Robinson-Patman Act, 82 Yale L.J. 1706 (1973) 50

Note, Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment, 28 Vand. L. Rev. 1277 (1975) .. 35

Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476 (1977) . 59

PAGE

R. Kuenzel & H. Schiffres, Making Sense of Robinson-Patman: The Need To Revitalize Its Affirmative Defenses, 62 Va. L. Rev. 1211 (1976) 62

S. Oppenheim & G. Weston, II, The Lawyer's Robinson-Patman Act Sourcebook (1971) 50

S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) ... 40

S. Rep. No. 2810, 84th Cong., 2d Sess. (1956) ... 50

S. Rep. No. 1005, 94th Cong., 2d Sess. (1976) 18, 35, 38

Standard Oil Company (Ohio) CCH Trade Reg. Rep., F.T.C. Transfer Binder, 1970-1973, ¶ 20,134 and ¶ 20,208, and ¶ 24,032, (withdrawn from adjudication for purpose of settlement, 6/17/75) 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEES

OPINIONS BELOW

The appellees adopt the summaries of the Opinions Below which appear in the appellants' briefs.

JURISDICTION

The appellees adopt the statements of Jurisdiction which appear in the appellants' briefs.

STATUTES INVOLVED

The appellees adopt the statements of the Statutes Involved which appear in the appellants' briefs.

QUESTIONS PRESENTED

1. Whether Paragraphs B and C of the Maryland Act, which prohibit the direct operation of retail service stations within the State of Maryland by producers or refiners of petroleum products, constitute an unlawful discrimination against or an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Paragraph C of the Maryland Act deprives appellant Continental Oil Company of its property without due process of law.

3. Whether Paragraph D of the Maryland Act is in conflict with the Robinson-Patman Act, or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Robinson-Patman Act, and thus is void under the Supremacy Clause of the United States Constitution.

4. Whether Paragraph D of the Maryland Act constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

A. Introduction.

This case is before the Court on direct appeal from the judgment of the Court of Appeals of Maryland upholding the validity of Chapter 854 of the Laws of Maryland of 1974, as amended by Chapter 608 of the Laws of Maryland of 1975, codified as Md. Ann. Code art. 56, §§157E(b)-(h) (1972 Repl. Vol. 1976 Cum. Supp.), (hereinafter "the Act" or "the Maryland Act") under the Constitution and laws of the United States.

The Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service

station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

(Italicized portions added by Chapter 608 of the Laws of Maryland of 1975).

The appellants in this case are, with two exceptions,[1] large, multi-national, fully-integrated oil companies involved in all four basic levels of the petroleum industry: production (of crude oil), refining, transportation and marketing. All of the appellants are engaged in company-operated retail marketing operations in the State of Maryland. The appellees include, in addition to the State of Maryland itself, the Governor, Attorney General and Comptroller of the Treasury of the State.

B. The Proceedings Below.

This litigation was commenced when Exxon Corporation, prior to the effective date of the Act, instituted suit on June 17, 1974, in the Circuit Court for Anne Arundel County, Maryland, seeking declaratory and injunctive relief from a host of alleged constitutional and statutory infirmities in the Act. (A. 10-28). Over the next nine months eight additional parties filed a total of six suits challenging the Act on the same or similar state and

[1] Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation (a wholly owned subsidiary of Commonwealth (A. 444)) are not engaged in the production of crude oil. Kayo Oil Company (a wholly owned subsidiary of Continental Oil Company (A. 358-59)) is engaged solely in retail operations. (A. 349).

federal constitutional grounds. (A. 36-49, 57-75, 85-103, 112-126, 136-144).[2] All cases were consolidated for purposes of trial.[3]

Motions for partial summary judgment with respect to Paragraphs D and F of the Act were filed by appellants Shell and Exxon on May 29, 1975, and by Gulf on June 19, 1975. (A. 153-55, 156-61, 161-63). The State answered on July 7, 1975 (A. 163-71), and a hearing on these Motions was held on August 22, 1975.

Trial convened on October 14, 1975, and prior to opening statements by counsel, the trial judge granted appellants' Motions For Partial Summary Judgment as to Paragraph D. The trial court held that provision to be in conflict with and preempted by provisions of the Robinson-Patman Act. (J.A. 49a-51a). Trial continued on the validity of the remaining portions of the Act and concluded on October 20, 1975. The evidence adduced at trial was relevant to Paragraphs B and C of the Act, and included the testimony of thirteen (13) witnesses, affidavits of additional witnesses in lieu of live testimony, and numerous exhibits. The evidence detailed the various types of retail operations engaged in by the appellants in Maryland, investments in such facilities, supply of product, pricing, etc. Five experts testified as to their opinion concerning the effects of the Act upon competition and the consumer in Maryland. Significant evidence was also introduced as to the

[2] The Bill of Complaint in *Commonwealth Oil Refining Company, Inc., et al. v. Govenor of Maryland, et al.* Equity No. 22,551 (March 19, 1975) has not been printed in the Appendix.

[3] On May 5, 1975 (on July 24, 1975, for Petroleum Marketing Corporation), the trial court entered an Order prohibiting state officials from enforcing the provisions of the Act against the appellants while the cases were pending and at the same time prohibiting appellants from opening and operating retail service stations on a company operated basis without first notifying the State of their intention to do so. (A. 151-153).

history and purpose of the Act, including testimony and materials presented to the Legislature. (J.A. 7a-10a).

On January 27, 1976, the Circuit Court for Anne Arundel County entered a final judgment and decree declaring the statute violative of the Due Process and Equal Protection Clauses of the federal Constitution and invalid as a taking of appellants' property without just compensation. (J.A. 53a-134a). The challenge to the Act under the Commerce Clause was rejected by the trial court. (J.A. 123a). The Maryland Court of Appeals unanimously reversed the decision of the trial court and the Act was upheld against all constitutional challenges on February 18, 1977. (J.A. 1a-44a). Following the denial of motions for reconsideration and for stay of the mandate by the Maryland Court of Appeals on April 13, 1977, (J.A. 45a-48a) and entry of judgment by the trial court declaring the Act constitutional and valid, the appellants filed these appeals.

On October 3, 1977, this Court noted probable jurisdiction of the appeals. Appellants collectively challenge the validity of Paragraphs B, C and D of the Act. Paragraphs B, C and D are challenged as being invalid under the Commerce Clause. Additionally, appellants Continental and Kayo challenge Paragraph C of the Act as being an improper exercise of the State's police power, constituting a deprivation of property without due process of law. Finally, Paragraph D of the Maryland Act is challenged as being in conflict with and preempted by the Robinson-Patman Act.

C. Facts Material To The Questions Presented.

(a) *Retail Marketing of Petroleum Products in Maryland.*

1. Supply of gasoline products to Maryland.

No crude oil is produced or refined into motor fuel in the State of Maryland. (J.A. 19a). All fuel sold in the State is produced and refined from locations outside the

State and transported into Maryland by pipeline, vessel or truck. (A. 194, 212, 214, 216, 223-24, 231, 255, 258). Motor fuel which enters the State is generally delivered to storage facilities located in Maryland, and from there it is transported to retail service station facilities. However, as the trial court noted in turning away the appellants' Commerce Clause challenge to the Act:

> This member of the court remains unconvinced that the act . . . would unduly burden interstate commerce.
>
> * * * *
>
> *In this case the flow of petroleum products into the State is not sought to be regulated or curtailed. The statute seeks merely to impose more stringent control over its sale after it enters its boundaries.* The law would merely assert a new ramification with regard to an industry which the State has already regulated, and the industry, up to now, has taken scant, if any, measures to assert this objection. (J.A. 123a) (emphasis added).

2. The nature and composition of the marketplace.

In Maryland, petroleum products are purchased by local retail customers, as well as by through-state travelers and transportation companies. (A. 196, 228-29). Historically, the retail marketing of petroleum products in the State of Maryland has been a highly competitive industry. (J.A. 13a, 99a). The consumer is served by various kinds of retail gasoline service stations which vary in method of operations and ownership, and in products and services offered. (A. 187). Service stations in Maryland include: (1) conventional retail service stations having several gasoline pumps, one or more service bays, and offering tires, batteries and accessories, (2) major service centers, (3) service stations combined with carwash facilities, (4) turnpike stations, (5) truck stops, (6) gasoline-only

stations offering limited or no automotive services, and (7) full and partial self-service stations. (A. 187).

The largest portion of retail marketing of gasoline is performed by independent service station dealers. (A. 190-91). Certain of these individual dealers own their own service stations or lease them from someone other than their supplier of petroleum products and sell petroleum products acquired under a supply contract with a branded or unbranded supplier. (J.A. 98a). The remainder of independent service station dealers, however, lease their station facilities and equipment from their supplier of petroleum products. (J.A. 98a). Another portion of retail marketing of gasoline is carried on directly by suppliers of petroleum products through their employees, employees of a subsidiary company or commissioned agents. (J.A. 98a).

Retail service stations generally fall into one of two categories: (a) "major brand stations" or (b) private or "secondary brand stations." (J.A. 98a). The general characteristics of a major brand conventional service station are: the offering of well-known, advertised brand-name products, the availability of repair services, acceptance of credit cards and the utilization of essentially "non-price" competition, including games and give-aways. (J.A. 98a). Most major brand stations are operated by independent retail service station dealers. (J.A. 99a). The general characteristics of a private brand or secondary brand station are: the offering of generally not well-known brand-name products, limited or no use of advertising, the acceptance of no credit cards and the offering of limited or no automotive repair services. (J.A. 98a-99a). The emphasis on price as a marketing tool is generally greater than at major brand stations. (J.A. 99a). Most private or secondary brand service stations are directly operated by suppliers or independent marketers of petroleum products with company employees. (J.A. 99a).

The supply shortage which existed during the time the Act was being considered was found most directly to affect the independent marketers of unbranded or privately branded gasoline who, as sources of supply became limited, experienced increases in prices to levels at which competition with major brand supplied stations was virtually precluded. (J.A. 8a, 14a; A. 271-74, 292-93). While there are service stations which do not fit into the above-described patterns, the vast majority of service stations do. (J.A. 99a).

3. Changes in the marketplace, 1972-77.

Evidence of the fact that "the retailing of petroleum products in the State of Maryland is a highly competitive industry" (J.A. 99a, Brief for Exxon at 8) is, in part, demonstrated "by the number and location of available facilities. . . ." (J.A. 99a). However, as was stipulated at trial, the total number of retail service stations in Maryland had been steadily declining through the period of 1972 through 1974. (A. 188). Furthermore, the facts demonstrated that independent dealer operated stations were being converted to company operations. (J.A. 14a).

For example, during the period of 1972-74, one company doing business in Maryland, BP Oil Corporation, Inc., had, pursuant to a predetermined marketing plan (A. 765-67, 773, 778-79, 785-90), converted previously independent dealer operations (and/or constructed) and put into operation forty-two company operated gasoline-only service stations within the State. (A. 189). The dealers at several of these locations were given the option of switching to an unknown and unadvertised brand-name product at a different location or accepting a position as a company employee. (A. 781-84, 809-11). During the trial, Gulf Oil Corporation admitted that it planned to convert or construct and put into operation a total of 22 company-operated facilities

in Maryland within the next five years (19 of which locations were currently being operated by independent dealers). (A. 226). As of July 1, 1974, there were approximately 233 company-operated service stations in Maryland. (A. 190-91). A total of 179 of these were directly operated by producers or refiners doing business in the State. (A. 189).

This trend of a decline in the total number of retail service stations in Maryland and of a corresponding increase in the number of company-operated stations has continued unabated throughout the course of this litigation. As stipulated at trial, the number of service stations in Maryland had declined from 3,995 in 1972 to 3,757 in 1974. (A. 188). As of January, 1977, the total number of service stations in the State had further declined to 3,631. (State's Memorandum of Points and Authorities In Opposition To Appellees' Motion For Stay Of Mandate in the Court of Appeals at 10).[4] On the other hand, there has been an increase of approximately 39% in the number of producer or refiner company-operated stations in Maryland from 179 in July, 1974 (A. 189) to 248 as of January, 1977. (State's Memorandum of Points and Authorities In Opposition To Appellees' Motion For Stay of Mandate in the Court of Appeals at 10).[5]

(b) *Legislative History of the Act.*

The record below demonstrates that the Act became law only after several months of concern, study and investigation of gasoline marketing practices in Maryland by the Legislative and Executive branches of Maryland government. Extensive Legislative hearings and debates were conducted. A special veto hearing was

[4] These figures are based on the 1977 registration records of the Gasoline Tax Division of the Comptroller's Office.

[5] *Id.*

held by the Governor prior to final approval of the legislation. (A. 183-87; J.A. 7a-10a).

This very deliberate governmental process began when, by letter dated June 13, 1973, the Governor of Maryland requested the Comptroller of the Treasury to conduct a study of gasoline retailing in Maryland to determine whether the then existing shortage was real or contrived and whether or not company-operated service stations received more favorable allocations of gasoline than did independent service station dealers. (Defendants' Exhibit A; A. 687-88, 543-44). Pursuant to said request, a survey questionnaire requesting a broad range of information on such marketing factors as: price changes, supply and allocation quotas, hours of operation, "voluntary allowances" (temporary gasoline price reductions granted to dealers by suppliers), other types of dealer aid, and sales limitations to customers was prepared by the Gasoline Tax Division of the Comptroller's Office under the supervision and direction of John K. Coleman, Chief of the Gasoline Tax Division, and Arthur E. Price, Chief Motor Fuel Inspector. (Defendants' Exhibit B; A. 689-93, 544-45). According to the testimony of Mr. Coleman, this survey questionnaire was prepared in cooperation with Mr. Price and his staff, some members of which had been previously employed in the industry. (A. 545). It was their collective opinion that the material requested in the survey would assist the Governor in determining whether the complaints that he had been receiving as to shortages at some retail stations were valid. (A. 545, 578-79).

On June 29, 1973, this questionnaire was mailed to 4,055 registered gasoline service station dealers in the State of Maryland. (A. 183). A total of 1,407 questionnaire returns, completed in whole or in part, (34.7% of those mailed) were received by the Gasoline Tax Division. (A. 183). The individual responses of the

dealers to the questionnaire were tabulated onto worksheets by the staff of the Gasoline Tax Division and summary tables of those responses, entitled "Recap by Brand," were prepared. (A. 183). From these materials, additional information gained from field investigations made during the period of the survey, telephone calls from service station dealers and their personal knowledge of the industry (A. 579-80), Messrs. Coleman and Price prepared a written analysis entitled "Results and Analysis of Service Station Dealers Questionnaire."[6] (Defendants's Exhibit D; A. 698-704, 547-49). This report did not attempt to draw any specific conclusions regarding the principal questions raised by the Governor; it merely reflected, with comment, the information and data received from dealer responses and left any conclusions to be drawn therefrom to the Governor. (A. 580). The report was submitted to the Governor on September 6, 1973.[7] (A. 185).

[6] A review of the report entitled "Results and Analysis of Service Station Dealers Questionnaire" demonstrates that the individual responses to said questionnaire were grouped in categories based upon the nature of the retail service station operation expressed in terms of ownership of property, brand of supplier and method of operation. Four such categories were designated: (1) Major Oil Company Owned, Leased to Dealer; (2) Privately Owned, Operated Under Major Brand; (3) Unbranded (including privately owned, marketing product under private name brand); and (4) Company Operated. The discussion contained under each category reflected information and data collected only from those dealer responses placed in that category. This report was introduced into evidence on the ground that it constituted part of the legislative history of the Act, because it was presented to both Senate and House committees considering those bills which eventually became the Act. (A. 186).

[7] A supplemental report entitled "Analysis of Comparative Report of Taxable and Exempt Gasoline Sales for the Calendar Year 1971, 1972 and First Six Months of 1973" was also submitted in the mailing. This analysis was prepared from computer data regularly collected by the Gasoline Tax Division of the Comptroller's Office. (A. 184-85, 709-720).

Also pursuant to the Governor's request of June 13, 1973, the Gasoline Tax Division of the Comptroller's Office prepared and mailed on July 17, 1973, a questionnaire to twenty major oil companies operating in the State. (A. 184). This questionnaire sought data and information on company activity in the State in such areas as: retail service station operations, new and planned service station construction and method of operation, past and projected sales volumes, allocation formulas, closings of various types of stations, cancellations and/or non-renewals of contracts, price increases to customers, elimination of voluntary allowances, rental abatements or other dealer aid, hours of operation of branded service stations and acquisition of new toll-road accounts. (Defendants' Exhibit C; A. 694-97, 546). Only nine oil companies responded in whole, and two responded in part, to the major oil company questionnaire. (A. 184). These responses were reviewed and analyzed by Messrs. Coleman and Price who then prepared a report thereof entitled "Analysis of Major Oil Companies Questionnaires" in the same general fashion as they had prepared the report on responses to the dealer questionnaire. (A. 580-81). This report was submitted to the Comptroller who forwarded it to the Governor on September 28, 1973. (A. 184). As with the dealer questionnaire, the oil company questionnaire did not reach any conclusions as to whether or not the shortage was real or contrived; the information was simply gathered and submitted to the Governor for his use. (A. 581, Defendants' Exhibit E; A. 705-08, 550).

Subsequent to the submission of the dealer report to the Governor, the Chief of the Gasoline Tax Division, at the direction of the Comptroller, drafted a bill to correct certain inequities thought by the Comptroller to be reflected in the returns of the service station dealer questionnaires. (A. 185, 575-76). In its Memorandum of Opinion, the trial court stated that, upon examination of Mr. Coleman by the Court, that it was Mr. Coleman's

personal opinion that he didn't feel it was necessary to draft the Act. (J.A. 116a). A careful reading of that examination by the Court, however, reveals no such testimony. Mr. Coleman merely stated he *didn't previously testify* that he felt the Act was necessary. He did testify that the Comptroller believed the Act to be necessary, but expressed no personal opinion as to the necessity of drafting the Act one way or the other. (A. 575-76). A copy of the proposed legislation was sent to the Governor by the Comptroller on September 13, 1973, and again on January 7, 1974, following discussions with the Governor and his staff. (A. 185).

Identical bills were subsequently introduced in the Marvland Senate (S.B. 465) and House of Delegates (H.B. 918). (A. 185, Defendants' Exhibits H and I; A. 724-28, 558). During consideration of these bills by the Legislature, both were amended to limit the prohibition on the operation of retail service stations to producers and refiners by deleting the term "wholesaler." (A. 185-86). Paragraph G was added by amendment to both bills to permit the Comptroller to adopt rules and regulations defining the circumstances in which a producer or refiner might temporarily operate a previously dealer-operated station. (A. 185-86). Finally, Paragraph H was added by amendment to S.B. 465 permitting the Comptroller to grant reasonable exceptions to the specified divestiture dates in the Act. (A. 185-86).

Public hearings were held on both bills by the Senate and House committees to which they were referred for consideration. (A. 186). At the public hearing on S.B. 465, before the Senate Economic Affairs Committee held on February 20, 1974, a total of sixteen witnesses (8 opponents, 8 proponents) registered to appear and testify on the bill. (A. 186). The following were represented among the opponents: Exxon Corporation, BP Oil Corporation, Inc., Shell Oil Company, the

Maryland Petroleum Association and the Maryland Oil Jobbers Council. (A. 186). James E. Grady, Public Affairs Manager for Exxon Corporation, according to a prepared statement left with the Committee, denounced as unfounded charges that company operation of retail service stations promoted inequitable product allocation, dealer lease cancellations and the perpetuation of give-away programs or that company stations are used to control prices. He stated that direct operation provided the most efficient, least costly method of satisfying consumer demand. (Defendants' Exhibit K-1; A. 729-38, 576-77). Mr. Grady left a nearly identical statement with the House of Delegates considering the House Bill. (Defendants' Exhibit K-2; A. 738-46, 576-77). At public hearings on H.B. 918 before the House, held on March 7, 1974, a total of seven witnesses registered to appear and testify on the House Bill. (A. 186). In addition to Mr. Grady of Exxon, a representative from Shell Oil Company testified against the bill and also left a prepared statement with the House committee. (Defendants' Exhibit K-3; A. 746-54, 576-77).

Among the proponents at both the Senate and House hearings was the Comptroller of the Treasury for the State of Maryland. He testified in favor of the bills and submitted copies of the aforementioned reports prepared by his office at the request of the Governor. (A. 186; Defendants' Exhibit D; A. 698-704, Defendants' Exhibit E; A. 705-20).

Following these hearings and favorable action with amendments by the committees, both the House and Senate bills were passed by the General Assembly. (A. 186). Senate Bill 465, which was eventually signed into law as Chapter 854 of the Laws of Maryland of 1974, was passed by the Senate without a dissenting vote. (A. 186).

After the General Assembly had passed both S.B. 465 and H.B. 918, the Governor announced a special veto

hearing to be held on May 29, 1974. He invited for his consideration the views and testimony of proponents and opponents to the legislation. At that special hearing, a total of fifteen witnesses registered to appear and testify. Seven witnesses registered as opponents to the bill, representing at least five oil companies and segments of the business community. Eight witnesses registered to appear and testify as proponents of the measure. (A. 186-87). S.B. 465 was signed into law by the Governor on May 31, 1974. (A. 187).

SUMMARY OF ARGUMENT

I.

PARAGRAPHS B AND C OF THE MARYLAND ACT FULLY COMPORT WITH THE COMMERCE CLAUSE AND NEITHER DISCRIMINATE AGAINST NOR UNDULY BURDEN INTERSTATE COMMERCE.

It is clear that notwithstanding an "effect" upon interstate commerce, *Cf. Perez v. United States,* 402 U.S. 146 (1971); *Wickard v. Filburn,* 317 U.S. 111 (1942), state regulation of internal commercial and business affairs does not offend the Commerce Clause where there is no discrimination against interstate commerce and such effects are not "clearly excessive" in relation to the statute's putative local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960). The prevention of destructive competition is a wholly appropriate state legislative function. *Parker v. Brown,* 317 U.S. 341 (1943); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (1939). Paragraphs B and C of the Maryland Act violate no prohibition of the Commerce Clause.

These provisions do not discriminate against interstate commerce. By its terms the Act applies equally to all producers and refiners of gasoline, leaves unaffected "interstate" independent marketers allowing them to

continue company operated retail service stations within the state, and does not impinge upon the operation of "interstate" refiners engaged in retail operations through dealer run service stations. No nexus between interstate as opposed to local interests inheres in the production or refining of petroleum; the nature of interstate commerce when "taken in conjunction with the inherent character" of the regulation effects no such discrimination. *Compare, Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940). Nor do these provisions discriminate against interstate commerce by curtailing the flow of interstate goods. *See, Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.,* 341 U.S. 329 (1951); *Breard v. City of Alexandria,* 341 U.S. 622 (1951).

The Act differs in *kind* from the burdens found to inhere in statutes invalidated by this Court. The case belongs to a line of decisions in which statutes regulating "essentially local" activity have been sustained notwithstanding their incidental effect upon interstate commerce. *See, e.g., Milk Control Board v. Eisenberg Farm Products; Parker v. Brown; Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937). The Act by its terms only restricts producers and refiners from pursuing the alternative of company owned stations as a method of retail marketing. Sales through independent marketers remain untouched and distribution through the wholesale market is not addressed by the strictures of the law. Accordingly, the Maryland Act should be upheld as a proper exercise of the state's police power.

II.

PARAGRAPH C DOES NOT DEPRIVE CONTINENTAL OIL COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The Maryland Act falls well within the power of the Maryland General Assembly to respond to practices which it deems injurious to the state's "internal commercial and business affairs." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934). The Legislature attempted to preserve and enhance competition within the Maryland retail gasoline market by prohibiting producers and refiners of petroleum from directly operating retail service stations. The evil that the legislature perceived in such direct operations by vertically integrated oil companies is a proper subject for legislative treatment, *FTC v. Sun Oil Company*, 371 U.S. 505, 528 (1963), and the propriety of the means chosen by the legislature is attested to by similar proposals enacted by or introduced in numerous state legislatures and Congressional "divestiture" proposals. *See, e.g.*, H.R. Rep. No. 1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 1005, 94th Cong., 2d Sess. (1976). The judgment that the concentration of economic power in 179 retail service stations presently operated by vertically integrated companies would not be in the best interest of Maryland citizens is peculiarly within the legislative province. This Court has made clear that it will not substitute its "social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. at 730. Continental does no more than to ask this

Court to pass upon the "wisdom" of the Maryland statute. It is submitted that Paragraph C and the Act *in toto* may stand under the Due Process Clause of the Fourteenth Amendment.

III.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Applying the proper federal standards for determining whether a state statute unconstitutionally conflicts with a federal statute, the Court of Appeals of Maryland properly held that Paragraph D of the Maryland Act (which requires that all "voluntary allowances" be granted uniformly on a statewide basis) does not conflict with Section 2(b) of the Robinson-Patman Act. Following the procedure established by this Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-80 (1974), the Maryland court examined the purposes and objectives of both laws and found them to be identical. (J.A. 41a).

By defining "voluntary allowances" as used in Paragraph D to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer" (J.A. 35a), the lower court interpreted the statute so as to allow an oil company to meet a lower price actually offered to its dealer by a competing oil company. Thus, Paragraph D was held not to impinge upon the operation of the Section 2(b) defense in those situations where oil companies share customers.

As a general rule, however, oil companies do not share retail dealer customers. Because it had construed "voluntary allowance" to include the ordinary situation in which an oil company lowers its price to its captive dealer customer in response to a price cut by a competing oil company to that company's dealer, the

Court of Appeals of Maryland was compelled to supply an answer to the question left open by this Court in *FTC v. Sun Oil Co.*, 371 U.S. 505, 512 n.7 (1963). The answer provided was clearly correct and fully supportive of federal antitrust policy.

In reaching its conclusion that Section 2(b) is not available for voluntary allowances, the lower court carefully examined the leading pre-*Sun Oil* decision of this Court interpreting that defense, *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951). Not surprisingly, the court found that *Standard Oil* presumes the existence of a "shared customer" to be a prerequisite to the invocation of Section 2(b).

To find the Section 2(b) defense available in the absence of a shared customer would require this Court to embrace the "conduit theory" of meeting competition which it expressly rejected in *Sun Oil*, and totally abandon the rationale of its prior decisions which narrowly construed that antitrust exemption. To now expand the scope of Section 2(b) so as to accommodate the special needs of the oil industry, brought about by their reliance upon exclusive dealing agreements, would be to return to the earlier "meeting competition" defense which the Robinson-Patman Act repealed. Moreover, the loose construction of an antitrust defense urged by appellants Exxon, Phillips, Shell, and Gulf, and now encouraged by the Federal Trade Commission, would burden severely the statutory interface uniting the Robinson-Patman Act and the Sherman Act, 15 U.S.C. § 1 (1975).

The primary-line liability which appellants fear is imaginary and gratuitous because Paragraph D is inoperable in those situations in which oil companies share customers. Similarly, liability for competitive injury to competing customers (secondary-line liability) resulting from compliance with Paragraph D is illusory.

The possibility of secondary-line injury within Maryland is precluded by the operation of the state statute under challenge. Any potential for secondary-line injury at Maryland's geographic borders may be avoided totally by "feathering," a pricing concept suggested by this Court in *Sun Oil*.

Finally, the acceptance of the construction of Section 2(b) urged by appellants, together with the market realities of exclusive dealing as practiced by them, would present very substantial policy problems resulting from the "good faith" requirement of that defense. Were Paragraph D to be struck down as unconstitutionally conflicting with Section 2(b), this Court impliedly would have placed its imprimatur on "good faith" price verification accomplished by discussions between competitors. Such a result seriously would inhibit interbrand price competition between oil companies and foster the spread of exclusive dealing to unrelated industries.

IV.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE COMMERCE CLAUSE.

The power residing in the federal government to regulate interstate commerce "does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 140 (1973). Paragraph D regulates sales which take place wholly within the borders of the State of Maryland. As such, it contains no constitutional infirmity based on commerce. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). No different result is mandated merely because the product originates outside the state which regulates its price. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974).

Any extra-territorial effect of Paragraph D is *de minimis* and clearly avoidable by "feathering." This, combined with the fact that Paragraph D applies equally to gasoline produced within and without Maryland, precludes any finding of undue burden on interstate commerce.

ARGUMENT

I.

PARAGRAPHS B AND C OF THE MARYLAND ACT FULLY COMPORT WITH THE COMMERCE CLAUSE AND NEITHER DISCRIMINATE AGAINST NOR UNDULY BURDEN INTERSTATE COMMERCE.

It is beyond question that State regulation of "internal commercial and business affairs," is a proper exercise of the police power. *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955). Such legislation which does not "discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 448 (1960); *Hennington v. State of Georgia,* 163 U.S. 299 (1896); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (1939). Maryland "unquestionably possesses an interest in preserving competition within the retail gasoline marketing industry"[8] and the effect of Paragraphs B and C upon commerce is incidental to the regulation of "essentially local" activity. *Compare, Milk Control Board v. Eisenberg Farm Products,* 306 U.S. at 352. Accordingly, the Act must be upheld unless the burden upon commerce is *clearly excessive* in relation to the putative local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Parker v. Brown,* 317 U.S. 341 (1943); *Milk Control Board v. Eisenberg Farm Products,*

[8] Brief of appellant Continental Oil Co., *et al.*, No. 77-12, at 43.

306 U.S. 346 (1939); *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937).

This case is markedly different with respect to both the nature of the interest advanced by the State in support of the Act and its effect upon interstate commerce from those cited by the appellants in their effort to overturn the judgment of the Maryland Court of Appeals. Attack upon the statute is premised upon the argument that while the statute accords even-handed treatment on its face to all producers and refiners of petroleum, it has the effect of discriminating against interstate commerce. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940). Reliance upon this authority is misplaced. In these cases "the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce generally speaking impossible." *Nippert,* 327 U.S. at 432. *Accord, Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 69 (1963). *Compare, Brimmer v. Rebman,* 138 U.S. 78 (1891); *Minnesota v. Barber,* 136 U.S. 313 (1890). The fact that oil is neither presently refined nor produced in Maryland does not, *ipso facto,* render the Maryland statute discriminatory against interstate commerce. The Court of Appeals properly noted, that "[w]hile oil is not produced in Maryland, and is not presently being refined in Maryland, there are producers or refiners which are Maryland corporations, or are headquartered here, or have substantial facilities here, or do a significant portion of their business here. All such '"Maryland"' businesses are prohibited by the Act from operating retail service stations." (J.A. 19a, 20a). No nexus between interstate as opposed to local interests inheres in the production or refining of petroleum. Not only does the Act by its

terms apply equally to all producers and refiners of gasoline, but it permits and indeed encourages interstate non-integrated marketers of gasoline to continue or initiate retail operations through company-owned stations and leaves unaffected the dealer run operations[9] of "interstate" refiners. This statute does not protect local producers from their out-of-state counterpart by seeking to "eliminate both competitive and economic advantages" that have brought a competing state industry "nationwide acceptance" of its goods. *Hunt v. Washington State Apple Advertising Commission,* ___U.S. ___, 97 S. Ct. 2434, 2445 (1977). The Maryland Act is not so parochial; nor is it an attempt by Maryland to isolate its own economy. *Dean Milk,* 340 U.S. at 354. The "evil" at which the Act was aimed and the means chosen by the Legislature to fulfill its objective are clearly legitimate. "The General Assembly, after considering the activities of producers and refiners in the industry, concluded, as have several congressional committees, that the recent trend of increased direct operation of service stations by producers and refiners, if allowed to continue, could

[9] Hudson Oil Company at the time of the enactment of the law represented the prototype of the "pure marketer" of gasoline whose operations were not included within the Act's proscriptions. Hudson's operations span 36 states through 315 retail service stations. (A. 516). Similarly, prior to its merger with Commonwealth, PMC served as another example of an "interstate" marketer of petroleum. (A. 449). At present such "interstate" marketers continue to exist within the State and may engage in the direct operation of company-owned service stations under the Act. (A. 190-91, 569). The law does not affect the dealer-run operations of such "interstate" refiners as Crown Central Petroleum Corporation and Hess, which compete with branded service station dealers. (A. 190-91). *See, also,* Brief of *Amicus Curiae* Champlin Petroleum Company, *et al.,* at 3 n. 4. It is submitted that the line drawn at the direct operation of retail service stations by producers and refiners of gasoline is not one drawn in favor of local as opposed to interstate interests. Indeed, the Act has the effect of inducing such interstate competitors into the Maryland market. (A. 591).

substantially decrease competition and lead to the control of that market by a few major oil companies." (J.A. 19a). *See, FTC v. Sun Oil Co.,* 371 U.S. 505, 528 (1963); H.R. Rep. No. 94-1762, 94th Cong., 2d Sess. 28 (1976); H.R. Rep. No. 1423, 84th Cong., 1st Sess. 17 (1955). The prevention of such destructive competition is a wholly appropriate legislative function, *Nebbia v. New York,* 291 U.S. 502 (1934); *United States v. Rock Royal Co-op., Inc.,* 307 U.S. 553 (1939); *Sunshine Anthracite Coal Co. v. Atkins,* 310 U.S. 381 (1940), permissible under the Commerce Clause. *See, e.g., Eisenberg Farm Products* and *Parker v. Brown.* "[G]uarding against out of state competition is a very different thing from curbing competition from whatever source." *H.P. Hood & Sons v. DuMond,* 336 U.S. 525, 570 (1949) (Frankfurter, J. dissenting). The Act, neither in purpose[10] nor effect, serves "to protect Maryland interests from out-of-state competition." (J.A. 19a).

Nor does the Act prohibit or curtail the flow of interstate goods. *Compare, H.P. Hood & Sons v. DuMond,* 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951). In rejecting the challenge that state regulation has impermissibly discriminated against interstate commerce, this Court has found that distinction controlling. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission,* 341 U.S. 329 (1951). *Compare, Breard v. City of Alexandria,* 341 U.S. 622 (1950).

In *Panhandle,* the appellant "natural gas company" transported that commodity in interstate commerce for distribution and sale in the State of Michigan. Appellee was a public utility of that state which distributed gas

[10] The legislative history of the Act fully supports the Court's conclusion that "[t]here is every indication that the purpose of the statute was to preserve competition within the retail gasoline marketing industry in Maryland." (J.A. 19a).

to domestic, commercial and industrial consumers in and around the City of Detroit and obtained its entire supply of natural gas from the appellant. In response to Panhandle's proposal to secure large industrial customers for the direct sale of natural gas in Michigan, the Michigan Public Service Commission issued an order requiring the company to obtain a certificate of public convenience and necessity before engaging in such direct sales. Noting that the end result of the order "might be the prohibition of particular direct sales," (341 U.S. at 331) by Panhandle, the Court rejected the argument that the company's right "to compete for the cream of the volume business without regard to the local public convenience or necessity," (*Id.* at 334) was embodied in the Commerce Clause:

> It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certified utility where the public convenience and necessity would not be served by direct sales. That there is neither discrimination nor prohibition here saves this regulation from the rule of such cases as *Hood and Sons v. DuMond,* . . . where a state was said to have discriminated against interstate commerce by *prohibiting* it because it would subject local business to competition. And the statute under which the Michigan Commission acted does not distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility. *Id.* at 336-37 (citations omitted) (emphasis added).

Appellants here distribute their goods in the retail market through sales to jobbers, wholesalers or independent marketers. (A. 11, 197; 58, 86; 113, 137; 213, 463). The statute does not operate as a "prohibition" nor does it distinguish between an "interstate or intrastate" company desiring to operate within the Maryland retail market.

Similarly, in *Breard,* the Court rejected the argument that a local ordinance constituted a discrimination against interstate commerce where the goods of interstate solicitors were not denied entry within municipal borders. The City of Alexandria, Louisiana, by ordinance required door-to-door salesmen to obtain the consent of residents before engaging in such solicitation. Although the statute on its face applied equally to out-of-state and in-state sellers, appellants nevertheless argued that the law placed "an undue and discriminatory burden upon interstate commerce . . . in effect . . . tantamount to a prohibition of such commerce," favoring the operation of local retail merchants. 341 U.S. at 635. Rejecting appellant's argument that the fact that the statute imposed significant financial burdens upon its operations constituted an undue burden upon interstate commerce,[11] the Court held:

> [T]he usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally immaterial and a matter for adjustment at the local level in the absence of federal legislation . . . . Taxation that threatens interstate commerce with prohibition or discrimination is bad, . . . but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason. 341 U.S. at 638.

The flow of appellants' product is not prohibited or curtailed by the Maryland statute—the "usual methods of seeking business are left open by the ordinance." *Id.*

Indeed, the effect of the Maryland statute upon appellants' operations differs in *kind* from the burdens

[11] It is apparent that the economic effect upon appellant's operation was substantial. Notwithstanding the Court's rejection of the company's constitutional claims, it was fully aware that compliance with the statute might well be "too costly and the results negligible." 341 U.S. at 635, 636 n. 11.

found to inhere in statutes invalidated by previous decisions of this Court. The Act has absolutely nothing to do with the interstate transportation, sale or movement of gasoline. It prohibits gasoline stations in Maryland from being operated directly by vertically integrated oil companies. The law is directed, at a "wholly intrastate activity" (J.A. 18a),[12] and the case belongs to a line of decisions in which state statutes regulating "essentially local" activity have been sustained notwithstanding their incidental effect upon interstate commerce. *See, e.g., Milk Control Board v. Eisenberg Farm Products,* 306 U.S. at 352; *Parker v. Brown,* 317 U.S. at 361; *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1936). The Maryland Act is not directed to exclusively interstate transactions. *Compare, H.P. Hood & Sons v. DuMond; Baldwin v. G.A.F. Seelig;* and *Eisenberg,* 306 U.S. at 353, nor does it constitute a regulation "of interstate commerce itself." *Lemke v. Farmers Grain Co. of Embden,* 258 U.S. 50 (1922); *Shafer v. Farmers Grain Co. of Embden,* 268 U.S. 189 (1925). *See, H.P. Hood & Sons,* 336 U.S. at 537. The law is not to be condemned as an enactment "aimed solely at interstate commerce attempting to affect and regulate the price to be paid . . . in a sister state." *Eisenberg,* 306 U.S. at 353; *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935). Maryland has not used "the threat of economic isolation as a weapon to force a sister state to enter into even a desirable reciprocity agreement," *Great Atlantic and Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 379 (1976), nor has it mandated that "business operations . . . be performed in the home

[12] The conclusion of the Court of Appeals that the Act was directed at a "wholly intrastate"activity is no more "patently erroneous," Brief of appellant Ashland Oil Inc., *et al.,* at 18, than this Court's judgment in *Parker v. Brown,* 317 U.S. at 361. The Maryland Court was fully aware of the reach of federal legislative jurisdiction, *Perez v. United States,* 402 U.S. 146 (1971); *Wickard v. Filburn,* 317 U.S. 111 (1942). (J.A. 20a-21a).

state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Toomer v. Witsell,* 334 U.S. 385 (1948). The Act does not effect a prohibition on the flow of interstate goods. *Brimmer v. Rebman,* 138 U.S. 78 (1891); *Minnesota v. Barber,* 136 U.S. 313 (1890). Commerce is not taxed, in a discriminatory manner or otherwise. *Boston Stock Exchange v. State Tax Commission,* ___ U.S. ___, 97 S. Ct. 599 (1977); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940). Against the backdrop of such precedent, appellants' claims of "undue burden" appear exaggerated.

Immediately apparent is the fact that the "prohibition against refiner operation of retail service stations will have little effect on the major brand stations. . . ."[13] It is patent from the record that these oil companies may effectively "monitor consumer preferences" and test "innovations in marketing methods" through dealer-operated stations. (A. 337-38, 485-87). Indeed, innovation in the industry has typically come from outside of such "main-stream" actors. (A. 592, 340). The "thrusts of price competition" will not take place from the major-owned, company-operated stations. (A. 489, 588-90). Assuming, *arguendo,* that the efforts of Exxon, Phillips, Shell and Gulf to "enhance brand acceptance" through company participation in the full range of retail offering, and to provide "dealer training," will be somehow impaired by the operation of the Act, it is submitted that such "burdens" do not pose a problem of constitutional dimension. Appellants'

[13] Brief of appellant Ashland Oil, Inc., at 15.

"dealer operated" stations are not touched by the law; the operation of other major oil companies is totally unaffected.[14] The Act does not place a "straight jacket" upon an entire industry. *Compare, Toomer v. Witsell,* 334 U.S. 385 (1948). Rather Exxon, Phillips, Gulf and Shell rely on the putative effects of the statute upon Kayo, Commonwealth and Ashland. It is submitted that the impact of the statute upon these companies is insufficient to vitiate Paragraphs B and C.

Kayo is the wholly-owned subsidiary and marketing arm of Continental Oil Company which operates in Maryland exclusively through company-operated stations.[15] (A. 214). Continental also sells gasoline in the wholesale market. (A. 213). Commonwealth and Ashland are refiners of petroleum[16] marketing gasoline at retail through company-owned and operated stations and competing as well in the wholesale market. Other independent refiners, such as Hess and Crown operate at retail in the Maryland market through independent dealers. (A. 190-91). Tenneco Oil Company, also an independent refiner, has no retail stations in the state and markets solely at wholesale. (A. 191, Brief of *Amicus Curiae* Champlin Petroleum Company, et al. at 5 n. 7). Although Continental and Ashland maintain they cannot remain in the market by structuring their operations to utilize independent dealers, neither company has definitely eschewed that course of

[14] Other major oil companies operating in the State, such as Texaco (307 stations), Union Oil (152 stations), and Sun Oil Company (225 stations), use independent dealers exclusively. Brief of appellant Ashland Oil, Inc., *et al.*, at 7. (A. 190-92).

[15] Continental does, however, market branded "Conoco" gasoline in other states, through conventional stations. (A. 212).

[16] Ashland, Commonwealth, Hess, Crown and Tenneco are five members of a "class" of independent refiners recognized in the petroleum industry. (A. 376, 386).

action.[17] Assuming, *arguendo,* that Continental and Ashland will choose to "abandon the sale of petroleum products at retail in the market if they cannot operate retail stations," that impact does not reach constitutional proportions. While "certain actors in the system will find it unattractive to enter the Maryland market," the effect of the Act will be to induce other competitors to enter. "Non-integrated marketers would tend to be prime customers for those stations." (A. 591-93). Moreover, there will be no significant impact upon the flow of petroleum into Maryland on the wholesale market. The operation of other wholesalers presently acting within the market is not restricted.[18] While Kayo maintains that it may not remain in operation unless dealer stations are used, Continental has not alleged that the statute will impair its ability to supply gasoline to the wholesale market. Although Commonwealth, through its marketing distributor PMC, questioned at trial its ability to maintain its wholesale operation should the Act take effect, it has sold its company-operated stations and intends to continue selling gasoline "at wholesale in the State if conditions

[17] The Court of Appeals correctly concluded that these companies did not make a "firm decision" to withdraw. While the President of Kayo testified that he saw "no alternative but to close the stations," no formal decision had been made by Kayo and no decision had been made at all by Continental Oil Company, the parent of that wholly-owned subsidiary regarding the operation of retail stores through dealers in Maryland. (A. 358-60). The Vice President of Ashland Petroleum Company testified that they would not choose dealer operation "if there were any other alternative open." (A. 508). As PMC sold all of its retail stations, the effect of this statute upon such operations is no longer at issue. Brief of appellant Ashland Oil, Inc., *et al.*at 14 n. 15.

[18] In addition to Tenneco Oil Company (Brief of *Amicus Curiae* Champlin Petroleum Company, *et al.* at 5 n. 7) the record reveals wholesale operations by all of the major oil companies who are parties to this suit. (A. 11, 197, 58, 86, 113, 137, 213, 463).

permit."[19] While Ashland maintained that the assured outlets which they acquired through the use of company-operated stations were of benefit to their wholesale marketing within the State, they as well did not maintain that they would not continue the wholesale marketing of gasoline.[20] The assertion that 32 companies belonging to a class of independent refiners, none of whom presented testimony at trial, would be adversely affected from entering the market at either the wholesale or retail level was wholly speculative. (A. 412). "There are obviously examples of independent refiners who are not marketers who prosper." (A. 625). "On balance the problem of entry is not a serious consequence of this law." (A. 593). Every exercise of the police power will affect interstate commerce to some degree, *Cf. Wickard v. Filburn*, — that the Act would create positive disincentives for certain firms that do business in the State and positive incentives for others to withdraw cannot stand alone as the constitutional litmus under the Commerce Clause. Interference with the flow of gasoline across state lines, if any, is *de minimis* and permissible as an incident to the regulation of the retailing of gasoline. *Parker v. Brown*, 317 U.S. at 367; *Head v. New Mexico Board*, 374 U.S. 424

[19] Brief of appellant Ashland Oil, Inc., *et al.* at 14 n. 15.

[20] Ashland's President stated that the result of the statute *could* jeopardize their position in the wholesale market (A. 509), and admitted that Ashland had never investigated the possibility of finding potential buyers in the market for all of its refined product. (A. 511). Ashland's expert witness testified that it would be "very difficult" to operate at wholesale, stating "[y]ou may have a wholesale account one day and because of a fraction of a penny a gallon, he may leave and go to someone else. . . ." (A. 531). The argument positing the necessity for such "assured outlets" reduces itself to no more than the proposition that such independent refiners seek to avoid actual price competition in the distribution of their products in the wholesale market — a proposition that the state submits is not embraced within the commands of the Commerce Clause.

(1963); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Miller v. California*, 413 U.S. 15, n. 25 (1973). "That such methods do not produce as much business . . . is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation." *Breard*, 341 U.S. at 638.

The interest asserted by the state is substantial. The evil inuring in the active pursuit of forward vertical integration by oil companies into local retail marketing at the expense and detriment of independent businessmen was recognized by this Court in *FTC v. Sun Oil*, 371 U.S. at 528. Noting that such a program might "be a greater evil," than the price discrimination there at issue, this Court remarked that it "saw no evidence that such forward vertical integration is inevitable or required." *Id.* That unlikely occurrence has come to fruition in the State of Maryland. During the last five years the total number of retail service stations in Maryland has been constantly declining. (A. 188, State's Memorandum of Points and Authorities In Opposition to Motion for Stay of Mandate in the Court of Appeals at 10). In the last three years there has been a 39% increase in the number of producer or refiner company-operated stations. *(Id.,* A. 189). Such companies intend to continue such forward vertical integration. (A. 226). Direct company operation by major oil companies provides an efficient vehicle for accomplishing the "maintenance of the long range and generalized price rigidity," condemned in *Sun Oil*, 371 U.S. at 523. Testimony at trial was adduced that the Act was procompetitive, in effect, denying producers the power to focus windfall profits obtained from crude prices and assuring that gasoline will flow in the wholesale market to the truly independent marketer (A. 594) who serves as the "only source of aggressive price competition" in the retail gasoline market. (A. 588-90). Maryland is not merely seeking to "enhance" the reputation

of its local producers, *Pike v. Bruce Church, Inc.*, nor does it seek to advance a laudible goal through legislation contradictory to its purpose. *Compare, The Great Atlantic & Pacific Tea Co. v. Cottrell*, and *Hunt v. Washington State Apple Commission*. This court has long recognized the issues of federalism underlying its review of state statutes not only under the Due Process Clause of the Fourteenth Amendment, but under the Commerce Clause as well. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939); *Parker v. Brown*. As this court stated in *Eisenberg*:

> Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the State law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable correlaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. 306 U.S. at 351-52.

The Maryland legislation which neither discriminates against interstate commerce nor disrupts its required uniformity may stand under the Commerce Clause.[21]

[21] It is apparent from the briefs of appellants and the nature of the Act that the Maryland statute which regulates the retail sale of gasoline within the state does not create any barrier to the flow of interstate goods or the operation of interstate business which may run afoul of the uniformity requirement of the Commerce Clause. *Compare, Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968). Nor do the federal antitrust laws provide any alternative for addressing the problems of vertical integration in the petroleum industry. *See*, Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1326-31 (1975). The Senate Judiciary Committee, in its *Report on the Petroleum Industry Competition Act of 1976*, characterized the efficacy of federal antitrust enforcement in dealing with major oil companies as follows:

> "The record of the past 80 years of antitrust enforcement makes painfully obvious that we do not have an adjudicative procedure that is, on the one hand, sufficiently expeditious and effective, and on the other, sufficiently insulated from political effects of economic power to deal with the competitive structure of the petroleum industry. To propose that such issues be litigated is, in effect, to propose that they be consigned to bureaucratic oblivion. S. Rep. No. 1005, 94th Cong., 2d. Sess. 124 (1976).

II.

PARAGRAPH C OF THE ACT DOES NOT DEPRIVE CONTINENTAL OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Continental Oil Company stands alone in its challenge to the Maryland statute on "substantive" Due Process grounds. (Continental and Kayo Jurisdictional Statement No. 77-12 at 13-18; Brief of appellant Continental Oil Company, *et al.* at 15-28). Readily conceding that scrutiny of the wisdom of the Act has been foreclosed "by the Court's prior decisions in Due Process cases," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934); (Brief of appellant Continental Oil

Company, *et al.* at 11). Continental nevertheless renews the argument, unsuccessfully presented to the Maryland General Assembly, that Paragraph C of the Act bears no relation to its objective of preserving and enhancing competition in the retail sale of gasoline. The state does not maintain that this Court should "abandon" federal review of state economic legislation under the Fourteenth Amendment; rather, it maintains that the Act *rationally* serves its stated purpose. The "caution and restraint," counseled by the "Lochner era," *Moore v. City of East Cleveland, Ohio,* ___ U.S. ___, 52 L. Ed. 2d 531, 539 (1977), is applicable to judicial review of the Legislature's "means" as well as its "end." "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has as a manifest tendency to cure or at least to make the evil less." *Liggett Co. v. Baldridge,* 278 U.S. 105, 115 (1928) (Holmes, J. dissenting); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. at 167.

Appellant's access to the legislative process prior to the enactment of Chapter 854 cannot be gainsaid. In response to the gasoline crisis of 1973, the Comptroller of the State Treasury directed questionnaires designed to elicit information relevant to the operation of the retail gasoline market to Maryland's 4055 registered service station dealers and to the 20 major oil companies operating within the state, including Continental and Kayo. (A. 183, 184). On the basis of the information obtained, identical bills were introduced into both houses of the Maryland General Assembly prohibiting producers and refiners of petroleum from directly operating retail service stations. Public hearings were held on both bills; at both hearings the major oil companies were fully represented and expressed their views in opposition to the Act. Following the passage of the Act, opponents including representatives of five

major oil companies again presented their views at a special veto hearing held by the Governor. (A. 185-87). At odds with the Legislature's judgment of the public welfare, Continental raises its substantive Due Process claims in this Court. Appellees submit that Continental Oil Company, like Exxon and Gulf corporations, Phillips Petroleum Company and Shell Oil Company, "is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

Appellant's attack upon the statute does not conform to the standard of review of state economic regulation under the Fourteenth Amendment evidenced by the decisions of this Court. State legislatures may "within extremely broad limits control practices in the business-labor field," *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952). The Legislature was presented with evidence that producers and refiners of gasoline were favoring company-operated stations in the allocation of gasoline; that as a result some service station dealers were forced to close; and that the major oil companies were engaged in a process which could lead to their control of the gasoline market through the use of company owned stations. (J.A. 19a). The Legislature responded by enacting a law which prohibited the direct operation of company owned stations by such vertically integrated companies. Expert testimony was adduced to the effect that the Act would "increase the competitiveness of the gasoline market" and therefore "increase the benefits that accrue to the driving public that come from the increase in competitive activity." (A. 588). Such expert testimony concluded that the Act would aid competition by denying producers and refiners the power to focus windfall profits from crude

prices upon their competitors (A. 594) and by increasing the amount of gasoline available to independent non-integrated companies (A. 627) who because of their smallness and geographical diversity provide the only source of "aggressive price competition" in the retail gasoline market. (A. 590). The Act bears a rational relation to its legislative end. The Legislature could rationally conclude that the concentration of economic power inherent in the direct operation of the *existing* 179 retail service stations by producers and refiners of gasoline within the State would not be in the best interest and welfare of its citizens. The evil addressed has been recognized as a proper subject for legislative treatment by this Court, *FTC v. Sun Oil Co.*, 371 U.S. at 528, and the propriety of the means chosen has been attested to by the introduction of similar legislation in numerous state legislatures and the deliberations of Congressional committees. *See, e.g.*, H. R. Rep. No. 1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 1005, 94th Cong., 2d Sess. (1976). It is submitted that the Act *in toto*, and Paragraph C in particular, cannot be characterized as "palpably in excess" of the legislative function. *West Coast Hotel Co. v. Parrish*, 300 U.S. at 398.

Continental's reliance upon *Moore v. City of East Cleveland, Ohio*, is particularly misplaced. There the Court in striking down East Cleveland's housing ordinance restricting dwelling occupancy to a narrowly defined family unit was fully aware of the issues of federalism and the separation of legislative and judicial functions underlying the litany of "substantive" Due Process decisions:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era

> demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilictions of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary — the boundary of the nuclear family.
>
> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." . . . Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. 52 L. Ed. 2d at 539-40.

The Maryland law does not run afoul of any "specific federal constitutional prohibition." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. at 536. The Act does not "cut deeply into private areas of protected family life." *Moore*, 52 L. Ed. 2d at 542 (Brennan and Marshall, JJ. concurring).

Continental has admitted that business conduct "deemed inimical to the public welfare, although not violative of the anti-trust laws" is a proper subject for state regulation. (Continental and Kayo Jurisdictional Statement No. 77-12 at 11 n. 14). The strictures of the Fourteenth Amendment are not heightened in cases where there is "no suggestion of any monopoly or monopolistic practice." *Nebbia v. New York*, 291 U.S. at 531. There is no "closed class or category of businesses affected with a public interest." *Id.* at 536. This Court has made clear that State "legislatures have constitutional authority to experiment with new techniques," and are entitled "to their own standard of the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S.

at 423. The case does not present a situation in which a protected liberty is "infringed by a law having no purpose or utility whatsoever." *Moore v. City of East Cleveland, Ohio,* 52 L. Ed. 2d at 567 (Stewart and Rehnquist, JJ. dissenting). It is submitted that the Maryland Act may stand under the Due Process Clause of the Fourteenth Amendment.

III.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

One question presented by appellants Exxon, Phillips, Shell, and Gulf is whether Paragraph D of the Maryland Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Robinson-Patman Act, or otherwise frustrates federal antitrust policy as reflected in the objectives of the Robinson-Patman Act and its Section 2(b) interface with the Sherman Act. Consequently, a brief overview of those objectives seems appropriate.

By enacting the Robinson-Patman Act, Congress sought to eliminate the more pernicious aspects of intrabrand price discrimination. The maximizing of intrabrand price rigidity was perceived as beneficial to competition because it would insure price uniformity in sales from a common seller to merchant buyers of the same brand. The free enterprise system was thought best to be maintained and promoted by having intrabrand competitor merchants purchase products from the same supplier at the same price. In this manner, the commercial success of merchants purchasing from a common seller would be a direct function of their efficiencies, and injury to interbrand competition through predatory intrabrand pricing would be minimized. S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3, 7 (1936).

Congress was aware that in the long run intrabrand price rigidity in the absence of monopoly would stimulate interbrand price and product competition; relaxation of this rigidity was sought only where its maintenance presumably would be at the expense of interbrand competition. The intersection of these two types of competition was determined by Congress to be the point where the intrabrand price restraint promoted by the Robinson-Patman Act should yield to the interbrand price freedom favored by the Sherman Act. To secure this interbrand preference, Congress enacted Section 2(b) of the Robinson-Patman Act.

By noting probable jurisdiction in this appeal this Court has assumed the burden of defining the boundaries of the intersection of intrabrand price rigidity and interbrand price flexibility. These boundaries will determine which transactions are entitled to a Section 2(b) defense.

Appellees submit that the point of intersection is denoted by the existence of one buyer whose business is solicited directly by more than one seller. By so interpreting Section 2(b), the ability to engage in localized price response is secured for those sellers who trade on the open, interbrand market and denied to those sellers who, having opted for exclusive dealing agreements, do not. This was the answer given by the Court of Appeals of Maryland to the question left unanswered by this Court in *FTC v. Sun Oil Co.,* 371 U.S. 505 (1963). (J.A. 32a-41a). As the following argument will demontstrate, the answer supplied was clearly correct and fully supportive of federal antitrust policy.

A. THE COURT OF APPEALS OF MARYLAND APPLIED THE APPROPRIATE FEDERAL STANDARDS IN DETERMINING THAT NO CONFLICT EXISTS BETWEEN PARAGRAPH D AND SECTION 2(b) OF THE Robinson-PATMAN ACT.

Paragraph D of the Maryland Act pertains to the manner in which "voluntary allowances" are to be granted within the state. Paragraph D states:

> "(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied." (J.A. 2a).

The appellants attacked the validity of Paragraph D by alleging that it conflicted with Section 2(b) of the Robinson-Patman Act. Section 2(b) exempts a seller from liability under Section 2(a) if the seller's discriminatorily lower price was offered in a good faith attempt to meet "the equally low price of a competitor" of the seller. In essence, appellants attacked Paragraph D on the ground that it prohibited, except on a statewide basis, a form of competitive price response permitted by Section 2(b) only on a local basis.

In response to this challenge the Court of Appeals of Maryland embarked upon an examination of the purposes and objectives of both laws (as mandated by this Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-80 (1974)) fully prepared, in the event that it found an actual or potential conflict, to "reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *DeCanas v. Bica*, 424 U.S. 351, 357-58 n.5 (1976).

No conflict was found to exist between the two statutes. In examining the purposes of Paragraph D, the court below found that it

> was intended to prevent the practice of localized price discounts, the Legislature believing that all retail service station dealers of the same brand should be treated equally. This is consistent with other provisions of the Act which are intended to eliminate discrimination against retail dealers by their suppliers. (J.A. 35a).

This finding caused the court below to define "voluntary allowances" as "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." (J.A. 35a). By employing a definition of "voluntary allowance" which comported with the legislative history of Paragraph D and appellants' affidavits, the court below reconciled the purposes of the Maryland statute with those of Section 2(b) and thereby eliminated the only point of obvious potential conflict between the two.

The conflict so eliminated was the situation where an oil company would desire to lower its price in response to an equally low price actually offered to its dealer-customer by a competitor, and would desire to do so only with respect to that dealer. An oil company confronted with such a circumstance clearly could respond and rely upon Section 2(b) to exempt it from liability under Section 2(a). By defining "voluntary allowance" so as not to include that type of price response, the court below ensured that Paragraph D would not impinge upon the operation of Section 2(b) in that situation.

The construction given to the term "voluntary allowance" did not eliminate, however, a potential conflict which was both obscure and all encompassing. A lower price offered by Exxon to an Exxon dealer in

response to an equally low price offered by Shell to a Shell dealer was clearly a "voluntary allowance" and thus subject to Paragraph D. (J.A. 36a). Whether such a price response was permissible under Section 2(b) was less clear. Thus, the court below was compelled to determine whether the two statutes were in conflict by examining the purposes and objectives of Section 2(b) and, ultimately, providing its answer to the question left open by this Court in *FTC v. Sun Oil Co.*, 371 U.S. at 512 n.7.

B. The Court of Appeals of Maryland was correct in determining that no actual or potential conflict exists between Paragraph D and Section 2(b) of the Robinson-Patman Act and that the objectives of Paragraph D and federal antitrust policy are harmonious.

The question of whether a seller is ever entitled to invoke the Section 2(b) defense with respect to a customer who has not been and will not be offered the equally low price which the seller desires to meet is, to a certain extent, a question of first impression for this Court. The Court first was urged to decide this very question by the Federal Trade Commission in *Sun Oil.* The Commission's theory was that the offering of a lower price to one of Sun's dealer-customers by a wholesale competitor of Sun "was a prerequisite to Sun's invocation of the §2(b) defense. . . ." 371 U.S. at 529 n.19. Sun's method of marketing gasoline through exclusive agreements with its dealers of course precluded the possibility that any such offer would be made.

The formal position of the Commission at that time was to

> allow one who has invited suspicion as to his motives by indulging in localized price-cutting to escape the sanctions of Section 2(a) of the Clayton Act only when his full and strict qualification under the Section 2(b) proviso indicates the legitimacy of his motives: *i.e.*, that a specific competitor of his had previously offered a specific customer *of his* a lower price, and that he thereupon attempted to meet that price. Brief for Federal Trade Commission at 44, *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963) (emphasis added).

This Court found that the facts presented in *Sun Oil* showed only that McLean (Sun's dealer-customer) was being undersold by Super Test (McClean's retail competitor); there was no showing that Super Test had purchased gasoline at a price lower than that paid by McClean. Consequently, this Court decided the case before it on the assumption "that Super Test was not the beneficiary of any enabling price cut from its own supplier." 371 U.S. at 512.

> Were it otherwise, i.e., if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier — presumably a competitor of Sun — we would be presented with a different case, as to which we herein neither express nor intimate any opinion. 371 U.S. at 512 n.7.

The definition given by the Court below presents that "different case."

Prior to the *Sun Oil* decision, only one lower federal court had considered the precise question presented here; the case was *Enterprise Industries v. Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). Despite appellants' claim that "the district court's ruling in *Enterprise* is limited to the 'precise' issue resolved in *Sun*" (Brief for appellants Exxon Corp., *et al.* at 70), the district court stated that "Texas could justify discrimination only by a showing that it dropped its price to the other stations *to meet an*

equally low price made available to those other stations by a competing oil company." 136 F. Supp. at 421 (emphasis added).

Subsequent to the *Sun Oil* decision only one[22] lower federal court has focused directly upon the precise question presented here; the case is *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972). Mr. Justice Clark, sitting by designation, opined that for Section 2(b) to be available to a seller, the lower price need not actually be offered to the customer of the seller who claims the defense. Although that ruling was advisory to the district court on remand of the case, it certainly was intended to answer the question reserved in *Sun Oil* and squarely presented here. To determine whether that question was properly answered in *Bargain Car Wash*, resort must be made, as was made by the court below, to *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), the only major pre-*Sun Oil* decision of *this* Court to focus upon the Section 2(b) defense.

There is no room for doubt that *Standard Oil* presumed that the existence of a "shared customer" was a prerequisite to the invocation of Section 2(b).

[22] The other post-*Sun Oil* lower federal cases which appellants view as focusing on that precise question shed very little light on it. For instance, *Bunty v. Shell Oil Co.*, [1972] Trade Reg. Rep. (CCH) ¶74,252 (D.Nev. 1972) is unclear as to whether its holding was based upon the Section 2(b) defense or a failure to show injury to competition. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965), in no way was dispositive of Section 2(a) liability because the lower court's ruling pertained only to motions to quash *subpoenas duces tecum*. And appellants concede that *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), and *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973), are not clear holdings as to the availability of the Section 2(b) defense. (Brief for appellant Exxon Corp., *et al.* at 68 n. 34).

There, the respondent had sold gasoline to "jobbers" at lower prices than to individual service stations, although these jobbers sometimes sold at retail themselves or resold to retail dealers at prices below those normally available to individual service stations. The record showed that each sale at a "lower price" to a jobber had been made to meet an equally low price offered that jobber by one of the company's competitors.

* * * *

The Court's entire discussion of the Section 2(b) defense was in terms of a seller's matching a lower price *actually offered* to his customer by one of his (the seller's) competitors. Thus, "if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under §2(b), in making a counteroffer * * *" (340 U.S. at 244). Further: "if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential * * * to meet that price rather than to lose the customer" (340 U.S. at 249). Again: "plain language and established practice * * * [permit] a seller, through §2(b), to retain a customer by realistically meeting in good faith the price offered to that customer" (340 U.S. at 250). The Court went on to explain why the Section 2(b) defense is economically justified when the seller's customer has actually received an offer from the seller's competitor: for then the seller's other customers will be no more harmed by the seller's equaling the lower price for the favored customer than they would be if he had not done so and the favored customer had accepted his competitor's offer (*ibid.*).

It thus seems fair to read the *Standard Oil* decision as having made explicit what was implicit in the statutory language: that the Section 2(b) defense is available only to a seller who has matched a lower price actually offered to his buyer by a competing seller. Brief for Commission in *Sun Oil* at 29, 30 (emphasis and bracketed material in original).

The assumption of a shared customer similarly seems to run through this Court's decision in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), in which emphasis was placed upon "individual competitive situations, rather than upon a *general system of competition.*" 324 U.S. at 753 (emphasis added). Without the existence of a shared customer as a requisite to Section 2(b) invocation, that defense would approach the breadth of the earlier "meeting competition defense" contained in former Section 2 of the Clayton Act. 38 Stat. 730.

As appellees stated in their Motion to Dismiss or Affirm, Respondent Sun presented this Court in *Sun Oil*

> with a theory that the requirement of having a "shared customer," so that there would be a price which could be met, was satisfied by looking beyond the oil company's immediate customers (the independent dealers) to the ultimate customers (the consumers). This "conduit theory," conjured up to accommodate the exclusive dealing practices of major oil companies, would have created the legal fiction that the consumer, rather than the dealer, is the "shared customer." The Court expressly rejected the "conduit theory" because it was designed to overlook the existence of those persons the Robinson-Patman Act was enacted to protect, specifically, the small, independent businessman. Appellees' Motion to Dismiss or Affirm at 17.

One need look no further than the undisputed facts of the record below to see that appellants seek to resurrect the rejected "conduit theory." According to the appellants' own testimony they grant a voluntary allowance (a discriminatory reduction in price) to their dealers to permit the dealers, in turn, to reduce the dealers' retail price to meet a competitive retail price being posted by competing branded dealers who have received price reductions from their suppliers. (Brief for appellants Exxon Corp., *et al.* at 18; A. 673-74). Appellants argue that this is necessary because without the ability to

grant such voluntary allowances their branded dealers, under such circumstances, would "quickly lose sales" and, in due course, "would go out of business." (Brief for appellants Exxon Corp., *et al.* at 64-65).

Beyond question, these facts demonstrate that the mechanism involved in "meeting the equally low price" contemplates a two-stage price reduction effected by two separate economic units at different levels of distribution. Because the retail dealer receiving the voluntary allowance is an "independent businessman" (Brief for appellants Exxon Corp., *et al.* at 64), there can be no means (absent an illegal price fixing agreement) by which the supplier can assure that the voluntary allowance, or any part of it, will be passed on and reflected in the recipient dealer's retail price. 371 U.S. at 524 n.14. And, as this Court has stated in *Sun Oil*, neither the language of the Section 2(b) proviso nor its legislative history contains any implication that Section 2(b) "comprehends a two-stage price reduction effected by two separate economic units at different levels of distribution."[23] 371 U.S. at 516. Moreover, these facts demonstrate no more than that the retail dealer who is the recipient of the voluntary allowance might be hurt (by lost retail sales) and might eventually go out of business if he did not receive the discriminatory price reduction from his supplier. This alone is not enough to trigger a Section 2(b) response. This Court has specifically found that "the defense [Section 2(b)] *does not* become applicable *simply because the favored purchaser would be hurt absent the discriminatory price cut* to him [by his supplier]. If a *threat of harm to the favored customer* was itself enough, under §2(b), to

[23] Rejecting Sun's broader interpretation of Section 2(b) the Court went on immediately to note that this "narrower interpretation of the statute [Section 2(b)] is consonant with overall rationality and broader statutory consistency and purpose, and effects a result compatible with legislative history and economic reality." 371 U.S. at 516.

immunize a discrimination, the §2(b) exception could largely nullify the prohibitions of §2(a)." 371 U.S. at 520 (emphasis added).

Not surprisingly, appellants place much reliance on the FTC's *Report on Anticompetitive Practices in the Marketing of Gasoline,* 3 Trade Reg. Rep. (CCH) ¶10,373 (1967).[24] They also place reliance upon the Department

[24] *See,* Note, *Gasoline Marketing and the Robinson-Patman Act,* 82 Yale L.J. 1706, 1713 n.44 (1973):

> The Federal Trade Commission's current reading of the §2(b) defense has a rather tortuous history, the Commission having reversed its position twice on the issue. Before the *Enterprise* decision the Commission thought the §2(b) defense would in some cases be available to a company supplier even though there was no competition for sales to his dealers. *See Hearings on Distribution Problems Before Subcomm. No. 5 of the House Comm. on Small Business,* [H.R. Rep. No. 1423], 84th Cong., 1st Sess., pt. 2, at 852-53 (1955). But in Senate hearings on gasoline price wars in 1955, the Commission declared its earlier view to be a "mistake" and embraced the *Enterprise* holding. *Hearings on Gasoline Price War in New Jersey Before a Subcomm. of the Senate Select Comm. on Small Business,* [H.R. Rep. No. 1423], 84th Cong., 1st Sess., pt. 2 at 450-51 (1955). The *Senate Report* following the hearings concluded that the failure of the Commission to prevent price discrimination was a substantial cause of the chaotic marketing conditions under investigation. Armed with the *Enterprise* decision, the *Report* said, the Commission "should move promptly against any major supplier still granting discriminatory price allowances." S. Rep. No. 2810, 84th Cong., 2d Sess., 28 (1956). The Commission did just that in *Sun Oil,* urging the Supreme Court to adopt the *Enterprise* doctrine.
>
> After its limited victory in *Sun Oil,* however, an entirely new set of Commissioners declared a general amnesty for oil companies then under complaint and decided to hold still more hearings on gasoline marketing practices. S. Oppenheim & G. Weston, II *The Lawyer's Robinson-Patman Act Sourcebook* 1182 (1971). In 1967 the Commission issued a report on its hearings. By a 3-2 vote the Commission reversed itself again, abandoned the *Enterprise* doctrine and enunciated its more lenient current position. Neither the hearings nor the *Report* focused on the *Enterprise* doctrine. Indeed, the *Report* failed even to mention the *Enterprise* decision or the FTC's former support for it in *Sun Oil. See,* 3 Trade Reg. Rep. (CCH) ¶10,373 (1967).
>
> However, it seems clear that the Commission has not totally abandoned the *Enterprise* doctrine. In January, 1973, the Commission issued a complaint against Standard Oil Co. of Ohio. Proposed relief included a ban on supplier sales to its dealers *at other than a uniform wholesale price* throughout an appropriate competitive area. 3 Trade Reg. Rep. (CCH) ¶20,134, complaint issued Jan. 31, 1973, *id.* at ¶20,208 (1973).

of Justice's recent *Report on the Robinson-Patman Act,* 93-97 (1977). Each of these "reports" would make Section 2(b) available for voluntary allowances. Because both agencies are charged with responsibilities for enforcement of the Robinson-Patman Act, appellants argue that the reports should be given great weight. Unfortunately, these reports reflect little more than the abdication of that responsibility by those agencies. They represent "fashionable" legal and economic theory which would substitute the view of their authors regarding the evil of price discrimination for that of Congress. As the Commission itself stated, engrafting a special exemption upon Section 2(b) to satisfy the unusual needs of the oil industry "not only renders the statute unworkable and indefinite but reopens the debate on basic economic policy that Congress sought to resolve by passing the Act." (Brief for Commission in *Sun Oil* at 45 n. 27).

Antitrust policy in general and Congressional intent in particular will not be served by this Court construing Section 2(b) in such a way as to allow oil companies to arrogate to themselves the right to meet a price offer which they deny their captive customers the ability to entertain. To do so would be wrong.

As appellants correctly state, " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " Brief for appellants Exxon Corp., *et al.* at

68, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). The mere fact that the interpretation urged by the two agencies rejects strict construction of an antitrust exemption constitutes an indication that it is wrong. *Abbott Labs v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976). Where, however, that interpretation has encouraged the invocation of that defense by an oil company, upon "the *plausible* belief that it was conforming to its legal obligations" (*Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) (emphasis added)) "there are *compelling* indications that it is wrong" and that the Court of Appeals of Maryland was correct.

C. Compliance with Paragraph D of the Maryland Act exposes appellants to neither primary-line nor secondary-line liability under Section 2(a) of the Robinson-Patman Act.

In order for a seller to be exposed to potential liability for injury caused to a competing seller resulting from price differentials (primary-line injury) the price which causes injury must have been offered to a customer shared or solicited by the two sellers. Not surprisingly, appellees can cite no authority for this contention. Nor is it surprising that appellants can cite no authority against it; neither appellants nor appellees have been able to uncover any instance where primary-line liability has been assessed absent the existence of a shared customer.

To support their gratuitous imposition of liability, appellants cite: *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 35 (7th Cir. 1976); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 956-57 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *H.J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 464 (S.D.N.Y. 1960); and

In re Forster Manufacturing Co., 62 F.T.C. 852 (1963), *rev'd and remanded*, 335 F.2d 47 (1st Cir. 1964), *upon remand*, 68 F.T.C. 191 (1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Each of these decisions clearly indicates the existence of a shared customer. In *Holleb*, the court stated that:

> [f]rom the evidence in the record, a jury could conclude that where Holleb and Produce Terminal *were competing for the same customers* and where the defendant violated the Clayton Act to obtain and retain customers, an injury to primary line competition would result. 532 F.2d at 35 (emphasis added).

In *Atlas Building* the court noted "that this builder and other builders thereupon ceased to purchase blocks from appellee and thereafter purchased all of their blocks from the appellant." 269 F.2d at 956. In *H.J. Heinz Co.*, the record showed that "42 of the 45 [supermarkets] carried Beechnut. On the other hand, 23 of these 45 chains had discontinued Heinz and 6 or 7 had never carried Heinz." 181 F. Supp. at 458. In *Forster*, the injured seller, Farmington, sold "directly to large users including Armour & Co." 335 F.2d at 52. Forster, charged with causing primary-line injury to his competitor Farmington, "gave a 5% discount to . . . Armour & Co. . . . ." *Id.* at 53. *Hampton v. Graff Vending Co.*, 478 F.2d 527 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973), similarly relied upon by appellants, seems impliedly to find the shared customers by noting that "the fact that 90% of Hampton's business is wholesale indicates that this is his true position in the distributive scheme." 478 F.2d at 532.

The total absence of any case establishing the liability which appellants view as preordained by their compliance with Paragraph D is also probably attributable in great part to the peculiarities of their marketing structure. Ordinarily, a customer's supplier is not his landlord as well; the converse is true, however, in

gasoline marketing. Not infrequently, part of the rent charged to a captive gasoline dealer by his supplier is based on the gallonage the dealer purchases. Also not infrequently, the gallonage "rent" varies, on a per gallon basis, according to the total monthly volume purchased by the dealer. The inevitable fluctuation in the true per gallon price (the tankwagon price plus the "per gallon rent") would make it highly unlikely that a supplier could ever establish the fact of primary-line injury.

It would seem that to establish a primary-line injury case resulting from the grant of a "voluntary allowance" a seller would need to establish:

> 1) that the true per gallon price was discriminatorily low;
>
> 2) that the captive dealer who received the lower price *agreed* to pass-on some portion of it to the consumers (albeit the allowance is "*voluntary*") and the amount so passed-on;
>
> 3) that the dealer supplied exclusively by the seller claiming injury similarly would have passed-on some part of an enabling price cut had he received one, and the amount he would have passed-on; and
>
> 4) the additional gallonage, if any, the complaining seller would have sold but for the voluntary allowance.

Although this Court's recent decision in *Illinois Brick*, ___ U.S. ___, 97 S. Ct. 2061 (1977), did not involve price discrimination, its rationale of simplifying antitrust suits by disallowing recovery for injury "to business or property" occasioned by "passing-on" would seem incapable of accommodating appellants' hypothetical. *Id.* at 2070-71. Moreover, step (2) constitutes vertical price fixing. *FTC v. Sun Oil Co.*, 371 U.S. at 424 n.14; *Bolick-Gillman Co. v. Continental Baking Co.*, 278 F.2d 649, 650 (9th Cir. 1960).

In sum, the necessities of antitrust policy as enacted by Congress and developed by this Court demand the existence of a shared customer not only for invocation of Section 2(b), but also for a finding of primary-line injury under Section 2(a).

The specter of potential liability for secondary-line injury is easily dispelled. Due to the operation of Paragraph D, the problem could present itself only at the state borders. Appellants concede that "a feathered extension of the Maryland allowance to adjoining states might lessen potential secondary-line liability by lessening the chance of secondary-line competitive injury. . . ." (Brief for appellants Exxon Corp., *et al.* at 78 n.41). It would appear, however, that feathering would accomplish more than appellants concede; it would *eliminate* the possibility of secondary-line competitive injury.

D. Paragraph D of the Maryland Act is not inconsistent with the full purposes and objectives of Congress in enacting the Robinson-Patman Act.

Appellants urge that Paragraph D "must be struck down on the *independent* ground that it nullifies the accomplishment and execution of the full purposes and objectives of Congress in enacting Sections 2(a) and 2(b) of the Robinson-Patman Act." (Brief for appellants Exxon Corp., *et al.* at 79, 80 (emphasis added). Thus, appellants argue for preemption albeit they do not use that word.

In *DeCanas v. Bica*, 424 U.S. 351 (19[illegible] this Court refused to find a California statute pertaining to [illegible]on-resident aliens preempted by the federal Immigration and Naturalization Act, 8 U.S.C. §1101 *et seq.* (1970). In so doing, the Court applied a three step test for determining whether a state law is to be held preempted by a federal law. Under that test, preemption is not

found unless 1) Congress has clearly indicated an intent to regulate the field exclusively; 2) the field is one requiring exclusive federal regulation; or 3) the state law is in actual or potential conflict with the federal law and preemption is necessary to protect the achievement of the aims of the federal law. *See, also, New York Department of Social Services v. Dublino,* 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973).

Appellants concede, as they must, "that by enacting the Robinson-Patman Act Congress [did not intend] to occupy the field to the exclusion of all state regulation of price discrimination." (Brief for appellants Exxon Corp., *et al.* at 55). The first of the three steps applied in *DeCanas* is thus of no help to appellants. The third step is similarly of no assistance to appellants in *this* argument because the ground upon which the argument is based is "independent" of a claim of actual or potential conflict. (Brief for appellants Exxon Corp., *et al.* at 79).

Consequently, the only question left is whether the field (price discrimination) is one requiring exclusive federal regulation. Not surprisingly, the only cases cited by appellants in support of this argument fall within that exclusive category. Those two cases, *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225 (1964), and *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), involved federal patent law and national labor law, respectively. It seems absolutely clear to appellees that the regulation of price discrimination does not represent so pervasive a federal interest as to require the exclusion of the states. It would seem that appellants share this view because, in their words, "the federal Robinson-Patman Act and the State's similar act reflect the *legitimate regulation of improper price discounts. . . .*" (Brief for appellants Exxon Corp., *et al.* at 97) (emphasis added).

Part of the "independent ground" upon which appellants urge federal preemption of Paragraph D is that it "severely disrupts the *delicate balance* struck by Congress between the purposes of the Robinson-Patman Act and the Sherman Act." *Id.* at 80 (emphasis added). That contention contains no small amount of irony.

Appellees recognize the delicacy of that balance. They view Section 2(b) of the Robinson-Patman Act as the statutory interface by which the two acts and their underlying philosophies are accommodated and united. They see appellants' contention as ironic because the judicial expansion of Section 2(b) so as to accommodate the marketing of gasoline (or any other product) through exclusive dealing agreements would shatter the balance so delicately struck between the intrabrand price rigidity promoted by the Robinson-Patman Act and the interbrand price flexibility favored by the Sherman Act.

One special accommodation which must be made if Section 2(b) is not given the strict construction urged by appellees pertains to the manner in which oil companies attempt to satisfy that defense's "good faith" requirement. In fact, the loose construction of Section 2(b) sought by appellants, combined with their unusual problems in verifying the "good faith" of their granting of voluntary allowances, would constitute a serious threat to the statute the proviso was enacted to accommodate — the Sherman Act.

E. THE ULTIMATE DETERMINATION OF THOSE CIRCUMSTANCES, IF ANY, UNDER WHICH SELLERS MAY HORIZONTALLY ENGAGE IN PRICE DISCUSSIONS IN ORDER TO SATISFY THE "GOOD FAITH" REQUIREMENT OF SECTION 2(b) SHOULD BE MADE UNENCUMBERED BY ANY PROBLEMS PECULIAR TO EXCLUSIVE DEALING.

Any seller who would rely on the Section 2(b) defense must show that he has acted in good faith. To a great extent, a seller's good faith is measured by the care he takes to determine the accuracy of the information he has received concerning the lower price he wants to meet. *See, In re Forster Mfg. Co., supra.* As appellants have noted (Brief for appellants Exxon Corp., *et al.* at 88), this Court has determined that it will review the validity of a claim which asserts that horizontal price discussions between competitors do not violate Section 1 of the Sherman Act if they are conducted for the purpose of verifying the "equally low price of a competitor" and not for the purpose of fixing prices. *United States v. United States Gypsum Co.*, 550 F.2d 115 (3d Cir. 1977), *cert. granted*, ___ U.S. ___, 46 U.S.L.W. 3182 (U.S. Oct. 3, 1977). If appellees are correct in their contention that no conflict exists between the Robinson-Patman Act and Paragraph D of the Maryland Act because the court below properly construed Section 2(b), then this Court will not need to consider when it hears *U.S. Gypsum* the virtual impossibility of suppliers who market through exclusive dealing agreements to verify prices in a traditional, pro-competitive manner. If, on the other hand, appellants' construction of Section 2(b) is determined by this Court to be correct and, as a consequence, sellers who share no customers must have some means by which to satisfy the "good faith" requirement of that defense, then the problems encountered in giving full effect to both the Robinson-

Patman Act and the Sherman Act become far more complex. Because the rule which will result from this Court's decision in *U.S. Gypsum* presumably will apply equally to all suppliers entitled to the Section 2(b) defense,[25] a brief examination of the means of price verification available to suppliers who share customers, but unavailable to suppliers who do not, seems appropriate.

The traditional and only truly reliable means of price verification is the examination of an invoice or a written quotation possessed by a customer who claims to have purchased at or to have been offered a lower price. The customer who has actually purchased at a lower price will have an invoice to prove it. The customer who has only received an offer of a lower price may produce a written quotation or, in its absence, prepare a written statement containing the necessary information.[26] Such an invoice, written quotation, or prepared statement, presented to the appropriate personnel of the supplier desiring to meet the lower price[27] should always constitute sufficient verification. The veracity of the only document which might be suspect, the statement prepared by the customer, would be supported by the threat of prosecution of the customer himself under Section 2(f) of the Robinson-Patman Act for knowingly inducing or receiving an illegal discrimination in price. *See, Beatrice Foods Co.*, 76 F.T.C. 719 (1969), *aff'd sub nom., Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); Note, *Meeting Competition Under the Robinson-Patman Act*, 90 Harv. L. Rev. 1476, 1496 (1977).

[25] *FTC v. Sun Oil Co.*, 371 U.S. at 524-25.

[26] Such a statement could also spell out the details of any rebate, discount, or other condition preferential to the customer but not appearing on either the invoice or a written quotation.

[27] *See, generally, Viviano Macaroni Co. v. FTC*, 411 F.2d 255, 258-59 (3d. Cir. 1969).

Moreover, the refusal by a customer claiming a lower price to produce any documentation should put the supplier to whom the request is made on notice that the lower price is probably fictitious. In any event, discussions with a person other than the customer for purposes of price verification never need be resorted to if the customer is common to the two suppliers in question.

Documentary verification at the customer level between the parties to exclusive dealing agreements of the sort engaged in by oil companies is, of course, not possible. The branded gasoline dealer has no written quotation or invoice to produce because he has not received an offer of a lower price on some other brand and, by the terms of his "products agreement" (or equipment lease agreement), would be prohibited from purchasing at the lower price (or any other price) had he received one. With regard to the preparation of a statement, he is no less in the dark than is his supplier concerning the actual existence of a lower price offered to some other dealer selling a different brand of gasoline. Moreover, it seems inconceivable that a branded gasoline dealer could be prosecuted successfully for violating Section 2(f) of the Robinson-Patman Act; the knowledge which he possesses concerning some phantom lower price offered by some other supplier to its dealer would be wholly insufficient to deceive the verifying supplier.

Thus, the exclusive supplier must seek verification from some person other than its captive customer who desires to obtain the speculative lower price. In order to avoid Sherman Act liability of the type affirmed by this Court in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), or, worse, criminal liability, the prudent exclusive dealer would first seek verification from its competing supplier's captive customer. Common sense, logic, and the most modest presumption of

business sense attributable to that captive customer lead, however, to the absolutely inescapable conclusion that any such verification request would be met with the response that the price in question is none of the inquiring party's business. To reply otherwise, at least if the reply were to be truthful, would be to negate the competitive advantage speculatively enjoyed by the party asked. Businessmen (and branded gasoline dealers are no less businessmen because they are captive) simply cannot be presumed willingly to act to their clear economic detriment, and it is against their economic interest to have a competing gasoline dealer receive an equally low price.

Not surprisingly, the same may be said of suppliers. A well understood and fundamental rule of business which seems to underlie this Court's holding in *Container*, may be postulated as follows:

> One competitor does not provide to another competitor confidential price information absent an agreement, tacit or explicit, that the information so provided will not be used by the recipient to the competitive disadvantage of the provider.

Thus, in response to the incipiency of a price war such as that hypothesized by the court in *Belliston v. Texaco, Inc.*, 455 F.2d 175, 182 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), Texaco might be expected to request confidential price information from its competing supplier. Texaco's competitor, however, would be expected *not* to answer, at least not truthfully. There are several reasons for this latter expectation. First, the instigator of a price war wants the additional volume which such an aggressive price policy is designed to get. Were he to confide his new price structure to his competitors, his lower price would result in lower profits at the same volume rather than higher profits due to increased volume.

Second, the instigator of a price war wants to keep his newly won customers. Consequently, it is in his best interest to

> compel . . . [his competitor requesting verification] to choose . . . between ruinously cutting its prices to all its customers to match the prices offered to one [albeit in exclusive dealing offered to none], or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs. *Standard Oil Co. v. FTC*, 340 U.S. at 250.

This ruinous choice would be the goal of the price war instigator because a "seller told it must cut prices to all or to none might well choose the latter course." R. Kuenzel & H. Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1235 (1976).

Third, if the competitor requesting price verification is refused, and verification is otherwise unavailable, any resultant price reduction on a limited basis would subject that competitor, in the absence of "feathering," to the Section 2(a) secondary-line liability he purportedly is attempting to avoid. Moreover, if we are to accept *arguendo* the correctness of appellants' contention that primary-line Section 2(a) liability may flow from one competitor to another although they neither share nor attempt to share a customer, (Brief of appellants Exxon Corp., *et al.* at 78 n. 41), the person refusing the request for verification would be expected to anticipate a treble damage action against his requesting competitor should the price inadvertently be beaten rather than merely met.

Thus, to the extent that businessmen consider the legal implications of verification requests and weigh those implications in terms of competitive price advantage, the prudent competitor would keep quiet. In fact, if the possibility of stupidity is ruled out, the only reasons

why a competitor might respond would be based upon intimidation or anticompetitive intent. The isolation of a non-shared customer from these motivations against apparent, legitimate self-interest is the factor which necessarily causes exclusive dealers to embrace horizontal verification and reject vertical verification. A supplier marketing through exclusive dealing agreements who is told that any verification in which he engages must not be horizontal has been told in effect that the Section 2(b) defense is unavailable to him.

It thus becomes apparent that if Paragraph D of the Maryland Act falls because a "voluntary allowance," as defined by the court below, is held to qualify for the Section 2(b) defense, and if price verification is to be a continued requirement of that defense, then the imprimatur of this Court of necessity will appear on some form of horizontal price verification. Even if the question of appellants' entitlement to the Section 2(b) defense were close, and it is not, the price verification problems posed by granting that entitlement would constitute sufficient reason to deny it. Besides creating a wholly unjustified antitrust exemption for those who market exclusively through captive customers and fostering the proliferation of that practice in other industries, such a rule would tear the fabric of both the Robinson-Patman Act and the Sherman Act. Intrabrand wholesale price rigidity, viewed by those who enacted the Robinson-Patman Act as desirable because it stimulates interbrand wholesale price competition and places purchasers from a common supplier on an equal footing, is softened substantially if "voluntary allowances" qualify for the Section 2(b) proviso. Interbrand competition, the primary objective of Section 1 of the Sherman Act, is virtually destroyed as between oil companies if "voluntary allowances" must be verified horizontally. Moreover, the expanded scope given the Sherman Act and the Robinson-Patman Act by this Court in *Container* and *Sun Oil*, respectively,

and the philosophy, expressed by this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, ___U.S.___, 97 S. Ct. 2549 (1977), of tolerating some intrabrand restraint in order to stimulate interbrand competition, largely would be negated. The objective, expressed by this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick*, of simplifying the trial of price fixing cases by introducing elements of predictability, would be damaged severely if speculation regarding the "good faith" element of horizontal price discussions were to become a standard element of defense.

The better route would be for this Court to have its examination of the anticompetitive effects of horizontal price verification unencumbered by any special accommodation implicitly granted here for exclusive dealing agreements in general or the oil industry in particular. By declining to expand Section 2(b) in the manner urged by appellants, this Court may well prevent the conversion of that defense into a Trojan horse which, ironically, would frustrate the philosophies of the two federal antitrust statutes it was enacted to unite. If Paragraph D were to be struck down as constituting an obstacle not to the fulfillment of those philosophies, but rather to their frustration, the irony would be complete.

IV.

PARAGRAPH D OF THE MARYLAND ACT IS NOT INVALID UNDER THE COMMERCE CLAUSE.

The federal government's power to regulate commerce, derived from the Commerce Clause, "does not exclude all state power of regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 140 (1973); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-67 (1945); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Paragraph D of the Maryland Act does not directly or indirectly create a burden on

interstate commerce. Paragraph D regulates sales which take place *wholly within the borders of Maryland*. As such, it is clearly distinguishable from state statutes stricken by this Court which attempted to regulate the price to be paid for goods or merchandise *purchased in a different state*. *See, Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)[28]. There is no constitutional infirmity in a state statute which regulates purely intrastate sales which by their very nature are essentially local in character. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). No different result is mandated simply because the product sold *within the state and whose selling price is there regulated* originates outside of the state where its price is regulated. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974); *Baxley v. Alabama Dairy Commission*, 360 F. Supp. 1159 (M.D. Ala. 1973). Nor does Paragraph D discriminate against interstate commerce or create any trade barrier; it applies equally to gasoline produced within or without Maryland. In short, Paragraph D neither directly nor indirectly regulates commerce beyond its borders. The nondiscriminatory uniform pricing policy reflected in Paragraph D does not, by any rationale, constitute a "serious impediment to the free flow of commerce." *Southern Pacific Co. v. Arizona*, 325 U.S. at 775.

Finally, the "ripple effect" on price which appellants contend would occur at Maryland's borders is illusory. (Brief for appellants Exxon Corp., *et al.* at 96). As they virtually concede, "feathering" would prevent the occurrence of any Robinson-Patman secondary-line

[28] In *Baldwin*, a New York milk control statute was found to be an unreasonable burden on commerce because it sought to fix the minimum price at which New Yorkers could purchase milk in another state. The statute declared that if the New York minimum price was not paid on milk purchased in another state, then the milk so purchased could not be offered for resale in New York.

competitive injury to their respective dealer customers who purchase at different prices on different sides of the state line. (*Id.* at 78 n.41). Any extra-territorial effect of Paragraph D is at best avoidable and at worst *de minimis*. In either event, Paragraph D does not unduly burden interstate commerce.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Maryland should be affirmed, and the Maryland Act upheld as constitutional.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General,
JON F. OSTER,
Deputy Attorney General,
THOMAS M. WILSON, III,
Assistant Attorney General
and Chief, Antitrust Division,
JOHN A. WOODSTOCK,
STEVEN P. RESNICK,
Assistant Attorneys General,
One South Calvert Street,
Baltimore, Maryland 21202,
Attorneys for Appellees.

December 17, 1977